BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6744 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

EBER F. CAHILL
(Claimant-Appellant)

S.S.A. No.

GAFFERS & SATTLER
(Employer-Respondent)

Employer Account No.

PRECEDENT
BENEFIT DECISION
No. P-B-185

FORMERLY
BENEFIT DECISION
No. 6744

The claimant appealed from Referee's Decision No. LA-9902 which disqualified him for benefits for five weeks on the ground that he had been discharged for misconduct connected with his most recent work within the meaning of section 1256 of the Unemployment Insurance Code. The decision also relieved the employer's account of charges under section 1032 of the code.

STATEMENT OF FACTS

The claimant was last employed by the employer herein as an inspector for approximately one and one-half weeks. He worked from 3:30 p.m. to 12 midnight. He was discharged at about 11 p.m. on October 21, 1963 under the circumstances hereinafter related.

The claimant's work consisted of inspecting hot water tanks. In performing this work, he had to lift

the tanks and move them about. He estimated that he inspected between 200 and 300 tanks an hour.

At about 11 p.m. on his last day of work he went into a small glass-enclosed office, seated himself at a desk therein, and prepared to write a report of defects he had found. The claimant testified that he had momentarily dozed while remaining in a seated position. A supervisor awakened him and told him he was discharged. At the moment he was awakened, the claimant still had a pencil in his right hand and was holding a report form on the desk with his left hand. He was still seated in an upright position.

The supervisor who discharged the claimant submitted the following unsworn statement:

> "This is to advise you that our Night Plant Superintendent Mr. Hank Doerffler went into the office where he observed Mr. Eber F. Cahill sleeping. Mr. Doerffler claims he slammed the door shut and this did not awake Mr. Cahill. He observed him sleeping for about two to three minutes. He then bumped the chair with his knee in which Mr. Cahill was seated while asleep. This awoke him at which time Mr. Doerffler asked Mr. Cahill to punch his time card and that he was terminated. This was at approximately 11:00 p.m.
>
> "Mr. Doerffler did not have any other witness."

The employer's representative who attended the hearing had no personal knowledge of this incident. The claimant could give no reason for "dozing off" except that he was tired and not accustomed to working the late hours which his shift required. He was aware of the company's rule against sleeping on the job.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides for the disqualification of a claimant who has been discharged for misconduct connected with his most

recent work. Section 1032 of the code provides that the employer's account may be relieved of charges under such circumstances.

We have consistently applied the definition of misconduct laid down by the Supreme Court of Wisconsin in Boynton Cab Company v. Neubeck, 296 N.W. 636. The definition referred to is as follows:

> ". . . The term 'misconduct' as used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of the statute." (Benefit Decisions Nos. 4648 and 5566).

In Benefit Decision No. 5273, we considered the case of a locker room attendant who was discovered asleep on a couch in one of the employer's offices while he was supposed to be working. Before lying down he had removed his glasses and had placed them on a desk nearby. It appeared that he had been asleep for several hours. In holding that the claimant therein had been discharged for misconduct connected with his work, we applied the above-quoted definition from the Boynton case. We stated in the cited benefit decision:

> ". . . Certainly his deliberate act of sleeping while on duty as shown by the fact that he had removed his glasses prior to lying down on the couch was more than mere

> inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in an isolated instance or good faith error in judgement or discretion. While sleeping on duty might not in all cases be deemed misconduct under the Act (now code), we hold under the particular circumstances of this case that the claimant was discharged for misconduct connected with his most recent work. . . ."

In Benefit Decision No. 5877 we considered the case of a flight electrical checkout man whose duties required him to work in the cockpits of airplanes. On the occasion of his discharge he was requested to work overtime and objected because he was tired; however, he decided to stay at work in order to avoid demerits. He had started to work that day at 5:30 p.m. At about 3:15 a.m. of the following day he was observed asleep in the cockpit of a plane. He was aware of the company rule against sleeping while on duty and was unable to advance any extenuating circumstances. In holding that the claimant had been discharged for misconduct connected with his work, we stated that the claimant's action of sleeping on the job during working hours was a deliberate disregard of the standard of behavior which the employer had the right to expect of him.

In Benefit Decision No. 6415 we considered the eligibility for benefits of a taxicab driver who had fallen asleep while driving with passengers. As a result, he was involved in an accident which caused minor personal injuries to his passengers but extensive damage to the taxicab. Prior to the accident the claimant had not obtained his customary sleep and felt tired. He had had the car heater on and the windows closed but had believed that he was not tired enough to fall asleep. In holding that the claimant had been discharged for misconduct connected with his work, we again applied the definition of the Boynton case and stated:

> ". . . Since a motor vehicle is recognized as a dangerous instrumentality, the claimant had a high degree of responsibility and duty to the employer, to the drivers of other automobiles, and to the taxicab passengers who had to rely upon him for safe passage. It is well known that falling

> asleep is a common cause of automobile accidents; and this claimant, as the driver of a taxicab, had an added responsibility in taking proper precautions for his safe handling of the vehicle. His failure to take such precautions manifests a high degree of carelessness if not a deliberate disregard of the standards of behavior which the employer had the right to expect of this employee. . . ."

In our opinion, the circumstances in the present case may be readily distinguishable from those in the cited benefit decisions. Although the supervisor's unsworn statement was to the effect that the claimant slept two or three minutes, the claimant testified under oath and subject to cross-examination that he had only "dozed off" momentarily. The claimant's testimony is supported by the fact that he was seated in an erect position with pencil in hand. We do not mean to imply that it need always be shown that a claimant intended to sleep to find him guilty of misconduct. We believe only that in the instant case the claimant was guilty of an isolated instance of mere inadvertence or ordinary negligence. We find nothing wilful, wanton, or deliberate in the claimant's actions which would constitute an intentional or substantial disregard of the employer's interests or of the employee's duties or obligations to the employer. While the claimant was aware of the employer's rule against sleeping on the job, this was his first violation, if it may be called a violation. Under these circumstances, we conclude that the claimant was discharged for reasons not constituting misconduct within the meaning of sections 1030 and 1256 of the code.

DECISION

The decision of the referee is reversed. Benefits are payable if the claimant was otherwise eligible.

The employer's account is not relieved of charges under section 1032 of the code.

Sacramento, California, April 3, 1964

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6744 is hereby designated as Precedent Decision No. P-B-185.

Sacramento, California, January 27, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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